

1           **STEPHEN F. HENRY, ESQ.**

2           STATE BAR # 142336

3           2625 Alcatraz Avenue, # 615

4           Berkeley, California 94705

5           Telephone: (510) 898-1883

6           Facsimile (510) 295-2516

7           shenry@SHenrylaw.com

8           Attorney for Plaintiff

9           UNITED STATES DISTRICT COURT

10           NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO

11           TERRY MCCULLY, an individual,

12           Plaintiff,

13           vs.

14           OAKLAND HOUSING AUTHORITY, a  
15           municipal entity, TRACY STABLER, in her  
16           official and individual capacity, ERIC  
17           JOHNSON, in his official and individual  
18           capacity, DREW FELDER, in his official and  
19           individual capacity, and DOES ONE through  
20           TEN, inclusive,

21           Defendants.

22           Case No. 3:18-CV-03426-JD

23           **PLAINTIFF'S SECOND AMENDED  
24           COMPLAINT FOR DAMAGES FOR**

- 1. Disparate Treatment In Violation  
of Fair Employment and Housing  
Act**
- 2. Violation of Federal Civil Rights  
(42 U.S.C. § 1983) – Due Process**

25           **AND DEMAND FOR JURY TRIAL**

26           Plaintiff Terry McCully ("Plaintiff" or "Mr. McCully"), for causes of action against  
27           defendants Oakland Housing Authority, Tracy Stabler, Eric Johnson, Drew Felder, and Does  
28           One through Ten, inclusive, alleges in this Complaint for Damages ("Complaint") as follows:

29           **THE PARTIES**

30           1. Terry McCully is and at all relevant times to this litigation has been a resident of  
31           the County of Alameda.

32           2. Defendant Oakland Housing Authority ("OHA") is a public entity and municipal  
33           corporation organized and existing pursuant to the laws of the State of California.

3. Defendant Tracy Stabler ("Stabler"), sued both in her individual and official capacities, is and at all times relevant to this litigation has been an individual employed by the OHA. At all times mentioned in this complaint, Ms. Stabler was Chief Financial Officer of the Oakland Housing Authority, established policy within her department, in which Plaintiff worked, possessed final policy-making authority for employment and administrative decisions within her department, including those decisions referenced below, and possessed authority to ratify decisions, including those referenced below, made by other Oakland Housing Authority directors and employees within her department.

4. Defendant Eric Johnson ("Johnson"), sued both in his individual and official capacities, is and at all times relevant to this litigation has been an individual employed by the OHA. At all times mentioned in this complaint, Mr. Johnson was Executive Director of the Oakland Housing Authority, established policy within the Oakland Housing Authority, possessed final policy-making authority for employment and administrative decisions, including those referenced below, and possessed authority to ratify decisions, including those referenced below, made by other Oakland Housing Authority employees and directors.

5. Defendant Drew Felder ("Felder"), sued both in his individual and official capacities, is and at all times relevant to this litigation has been an individual employed by the OHA. At all times mentioned in this complaint, Mr. Felder was Director of Human Resources, established employment policy within the Oakland Housing Authority, possessed final policy-making authority for employment and administrative decisions regarding employment, including those referenced below, and possessed authority to ratify decisions regarding employment, including those referenced below, made by other Oakland Housing Authority employees and directors.

6. Plaintiff is ignorant of the true names and capacities of the defendants sued in this litigation as Does One through Ten, inclusive and, as a result, sues these defendants by these fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities of these defendants once they have been ascertained. Plaintiff is informed and believes and

thereupon alleges that each of the fictitiously named defendants is in some manner responsible for the injuries and damages to Plaintiff alleged in this litigation.

7. Plaintiff is informed and believes and thereupon alleges that at all times relevant to this litigation, defendants, and each of them, were the agents, servants, and employees of their codefendants, and that these defendants, in doing the things mentioned in this Complaint, were acting within the course and scope of their authority as such agents, servants, and employees, and were acting with the permission and consent of their codefendants.

#### **JURISDICTION AND VENUE**

8. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 7 above, as well as facts currently unknown.

9. This Court has original jurisdiction of this matter under 28 U.S.C. § 1331 on the basis that the amount in controversy exceeds \$75,000, and the case includes a Federal question. This Court has supplemental jurisdiction over state law claims pursuant to 28 USC § 1337(a) because all claims derive from the same common nucleus of operative facts. Jurisdiction over the defendants, and each of them, exists because each of the defendant entities named in this litigation are present and operating within the jurisdictional limits of the Northern District of California, and each of the individual defendants named in this litigation are employed within the jurisdictional limits of the Northern District of California.

10. Venue is proper because the employment relationship between Plaintiff and defendants, and each of them, that gave rise to some of the claims in this litigation existed within this judicial district and most or all of the acts and omissions complained of in this litigation took place here. Venue is also proper because most or all of the acts and omissions that occurred outside of the above employment relationship and are complained of in this litigation took place within this judicial district.

## **FACTUAL ALLEGATIONS**

11. Terry McCully became interim Information Technology (“IT”) director at OHA on December 11, 2015.

1       12.     Mr. McCully was then hired as IT Director on May 2, 2016 with a six month  
2 probation period.

3       13.     On October 28, 2016, Mr. McCully had his sole meeting with Mr. Johnson and  
4 Ms. Stabler regarding IT issues.

5       14.     On November 2, 2016, Mr. McCully's probation ended pursuant to OHA policy.

6       15.     On November 29, 2016, Mr. McCully was called into Mr. Johnson's office for a  
7 meeting with Mr. Johnson and Ms. Stabler and was told that his probation was being extended to  
8 a full year.

9       16.     On December 2, 2016, Mr. McCully was given a letter reiterating the extension of  
10 his probation which had already ended on November 2, 2016 pursuant to OHA policy.

11      17.     On April 25, 2017, Mr. McCully was called into Mr. Johnson's office told by Mr.  
12 Johnson, Ms. Stabler and Mr. Felder that he did not pass probation. Mr. McCully responded that  
13 he had already passed probation on November 2, 2016 and had not been told probation was  
14 being extended until three weeks later.

15      18.     The meeting adjourned to investigate the facts.

16      19.     On April 26, 2017, Mr. McCully was called back into Mr. Johnson's office, told  
17 the date he had was wrong, that he had been told on October 28, 2016 that his probation was  
18 being extended and that he had less than two days (by 3:00 p.m. on May 1, 2017) to accept a  
19 demotion to IT Manager.

20      20.     Mr. McCully accepted the demotion in lieu of being terminated.

21      21.     Mr. McCully was never given any written or verbal information as to his progress  
22 as IT Director towards successfully ending his probation after December 2, 2016.

23      22.     Upon information and belief, Defendants Stabler, Johnson, and Felder met,  
24 discussed and agreed, or communicated agreement by other means, to place Plaintiff in the role  
25 of IT Director to fill a short term need for an IT Director.

26      23.     Upon information and belief, Defendants Stabler, Johnson, and Felder met,  
27 discussed and agreed, or communicated agreement by other means, to falsely claim that they had

1 extended Plaintiff's probation, after such probation had ended, in order to keep Plaintiff in the  
2 role of IT Director to fill a short term need for an IT Director.

3       24. Upon information and belief, Defendants Stabler, Johnson, and Felder met,  
4 discussed and agreed, or communicated agreement by other means, to illegally remove Plaintiff  
5 from his role of IT Director, despite his having passed his true probationary period, after the need  
6 to fill a short term need for an IT Director was concluded.

7       25. Upon information and belief, Defendants Stabler, Johnson, and Felder met,  
8 discussed and agreed, or communicated agreement by other means, to knowingly place Plaintiff  
9 in the role of IT Director to fill a short term need for an IT Director, falsely claim that they had  
10 extended Plaintiff's probation, after such probation had ended, and illegally remove Plaintiff  
11 from his role of IT Director, despite his having passed his true probationary period, to deny  
12 Plaintiff his constitutional right to his property interests and to further their own goals at  
13 Plaintiff's expense.

14       26. Upon information and belief, Defendant Stabler, as Chief Financial Officer,  
15 ratified decisions made by Felder with respect to employment of Plaintiff in her department.

16       27. Upon information and belief, Defendant Felder, as Director of Human Resources,  
17 ratified decisions made by Stabler with respect to employment of Plaintiff in Stabler's  
18 department.

19       28. Upon information and belief, Defendant Johnson, as Executive Director, ratified  
20 decisions made by Stabler and Felder with respect to employment of Plaintiff in Stabler's  
21 department.

22       29. In taking the actions above, to deprive Plaintiff of a property interest in his  
23 promotion at the end of his established probation period, each Defendant lied to Plaintiff  
24 regarding a purported extension of his probationary period, which was never proven or  
25 documented, deprived Plaintiff of any procedure with which to challenge the fabricated  
26 extension of his probationary period, and offered him only two choices: demotion or termination.  
27

**FIRST CAUSE OF ACTION**  
**FOR DISPARATE TREATMENT IN VIOLATION OF**  
**THE FAIR EMPLOYMENT AND HOUSING ACT**  
**(Against Defendant OHA and Does One through Ten)**

30. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 29 above, as well as facts currently unknown.

31. Plaintiff is 70 years old.

32. This cause of action is brought pursuant to the California Fair Employment and Practices Act, section 12940(a) of the Government Code prohibiting termination of an employee from employment on the basis of age, and the corresponding regulations of the California Department of Fair Employment and Housing.

33. At all times mentioned in this complaint, Defendant regularly employed 5 or more persons, bringing defendant within the provisions of sections 12900 et seq. of the Government Code prohibiting employers or their agents from discriminating against employees on the basis of age.

34. Plaintiff filed a complaint with the Department of Fair Employment and Housing, and received a Right to Sue Letter from the Department of Fair Employment and Housing.

35. At all times mentioned in this complaint Plaintiff was fully qualified for Plaintiff's position.

36. Defendant OHA discriminated against Plaintiff because of Plaintiff's age in that he was treated differently than younger employees.

37. Plaintiff believes and alleges that Plaintiff's age was a substantial and determining factor in defendant employer's decision to demote Plaintiff

38. Defendant's demotion and other adverse employment actions towards Plaintiff as alleged in this complaint constitute an unlawful employment practice in violation of section 12940(a) of the Government Code.

39. As a direct, foreseeable, and proximate result of defendants' discriminatory acts,

Plaintiff has suffered and continues to suffer substantial losses in earnings and job benefits, and has suffered and continues to suffer humiliation, embarrassment, mental and emotional distress, and discomfort, all to Plaintiff's damage in an amount in excess of \$500,000, the precise amount of which will be proven at trial.

40. Plaintiff has incurred and continues to incur legal expenses and attorney fees.

Plaintiff is presently unaware of the precise amount of these expenses and fees and prays leave of court to amend this complaint when the amounts are more fully known.

41. WHEREFORE, Plaintiff requests relief as hereinafter provided.

## **SECOND CAUSE OF ACTION**

## **FOR VIOLATION OF PLAINTIFF'S FEDERAL CIVIL RIGHTS**

## OF DUE PROCESS

**UNDER 42 U.S.C. SECTION 1983, ET SEQ.**

**(Against All Defendants and Does One through Ten)**

42. Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 41 above, as well as facts currently unknown.

43. Plaintiff is informed and believes and thereupon alleges that actions taken against Plaintiff by Defendants and Does One through Ten, inclusive, violated Plaintiff's right to due process in demoting him after he had acquired a property interest in his position as IT Director. Plaintiff is informed and believes and thereupon alleges that defendants, and each of them, violated Plaintiff's constitutional rights as described in this Complaint, by deliberately denying Plaintiff's right to due process in demoting him after he had acquired a property interest in his position as IT Director.

44. Plaintiff is informed and believes and thereupon alleges that defendants, and each of them, violated Plaintiff's constitutional rights as described in this Complaint because of customs, policies, directives, practices, acts and omissions of authorized policy makers of Defendant OHA and its officers. These customs, policies, directives, practices, acts and omissions include, but are not limited to, the maintenance of employment practices that allow for

1 actions which violate due process rights of employees and allow deceitful use of allegedly  
2 extended probation periods to deny employees property interests in their promotions. These  
3 customs, policies, directives, practices, acts and omissions constitute gross negligence and/or  
4 deliberate indifference on the part of Defendant in its obligation to ensure the preservation of an  
5 employee's constitutional rights.

6       45. Defendants Johnson and Felder, as ultimate decision makers with regard to policy  
7 and employee discipline, and Defendant Stabler as an ultimate decision makers with regard to  
8 policy and employee discipline within her department, in which Plaintiff worked, ratified the acts  
9 and omissions of each other violative of Plaintiff's due process rights prior to Plaintiff's forced  
10 demotion.

11       46. The demotion without due process forced upon Plaintiff was a deliberate choice  
12 of action made from among various alternatives by Defendants.

13       47. In the alternative, each individual defendant was an official to whom  
14 policymaking authority regarding employee discipline, demotion and termination had been  
15 delegated and that these subordinate individual defendants were responsible for establishing final  
16 policy with respect to the adverse actions in violation of due process taken against Plaintiff.

17       48. The actions of Defendants and Does One through Ten, deprived Plaintiff of rights  
18 secured by the Constitution and laws of the United States, including without limitation Plaintiff's  
19 due process of law.

20       49. As described above, Defendants and Does One through Ten, individually and  
21 together, engaged in acts designed to deny Plaintiff's constitutional, statutory and legal rights  
22 and took each of these actions against Plaintiff under color of state law.

23       50. Individual defendants, by permitting, allowing and encouraging the other  
24 individual Defendants and Does One through Ten to engage in this retaliatory conduct toward  
25 Plaintiff, and to engage in acts and omissions which deprived Plaintiff of Plaintiff's procedural  
26 due process, approved of and ratified their conduct.

27       51. As a direct, foreseeable, and proximate result of Defendant's acts and omissions,

1 Plaintiff has suffered and continues to suffer substantial losses in earnings and job benefits, and  
2 has suffered and continues to suffer humiliation, embarrassment, mental and emotional distress,  
3 and discomfort, all to Plaintiff's damage in an amount in excess of \$500,000, the precise amount  
4 of which will be proven at trial.

5 52. In addition, Plaintiff seeks reasonable attorneys fees and costs.

6 53. In taking their retaliatory and punitive actions against Plaintiff, individual  
7 Defendants and Does One through Ten, acted with oppression, fraud or malice and in conscious  
8 disregard and deliberate indifference for Plaintiff's rights in that they knew that their actions were  
9 harmful and they sought to humiliate and punish Plaintiff and to make his an example to any  
10 others who might dare to object to or interfere with their decisions, plans and deliberate  
11 omissions. As a result, Plaintiff is entitled to an award of punitive damages against each of these  
12 individual defendants.

13 54. Wherefore, Plaintiff prays for damages against defendants, and each of them, as  
14 set forth below.

15 **PRAYER**

16 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as  
17 follows:

18 1. For monetary damages against Defendants, and each of them, in an amount  
19 sufficient to compensate Plaintiff for loss of income, loss of benefits, loss of use, for emotional  
20 distress, and for the injury and damage that Defendants have caused to Plaintiff's name and  
21 reputation;

22 2. For punitive damages against individual Defendants in an amount sufficient to  
23 deter them from engaging in similar misconduct toward other employees, and to make an  
24 example of them to others who may otherwise be inclined to engage in such wrongful conduct;

25 3. For costs of suit incurred herein, including Plaintiff's reasonable attorneys' fees,  
26 expert witness expenses and fees, and other costs and expenses that Plaintiff has been forced to  
27 incur to prosecute this action under all applicable statutory or contractual bases;

1           4. For injunctive relief, as the Court may deem proper.  
2           5. For such other, further relief as the Court may deem proper.

3           Dated: July 10, 2018

4           STEPHEN F. HENRY, ESQ.

5  
6           By:/s/ Stephen Henry\_\_\_\_\_  
7           STEPHEN F. HENRY  
8           Attorney for Plaintiff

9           Plaintiff demands trial by jury in this action.

10          Dated: July 10, 2018

11          STEPHEN F. HENRY, ESQ.

12  
13          By: /s/ Stephen Henry\_\_\_\_\_  
14          STEPHEN F. HENRY  
15          Attorney for Plaintiff